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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

A. T. GORDON, ET AL.,

Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,

Respondents.

Petitioners's Brief

Petitioners' Brief in Support of Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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No. 1244

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OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia is reported in 170 *S. E. 2d* 783, and set forth in it entirety in *Appendix*, page 22a.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 *U.S.C.*, Section 1257 (3). The final judgment of the Court below denying Petitioners' Motion for Rehearing was entered on December 2, 1969, and is set forth in its entirety in *Appendix*, page 2a. Petition for Writ of Certiorari was filed herein on February 26, 1970, and within 90 days from and after the date of entry of said judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of West Virginia, Article X, Section 1 and Article X, Section 8; West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 4; West Virginia Code, 1931, as amended, Chapter 13, Article 1, Section 14; West Virginia Code, 1931, as amended, Chapter 11, Article 8, Section 16, are all set forth so far as pertinent in *Appendix*, pages 70a, 71a, 72a, 73a and 74a, respectively. These provisions establish that boards of education and other political subdivisions of the State of West Virginia prior to the issuance of general obligation bonds must submit the question of the issuance thereof to the voters of said subdivision and require the approval of three-fifths of the persons voting thereon before the issuance can be authorized and further establish the principle that local tax levying bodies cannot levy in excess of the rates established in the Constitution without submitting the proposal to the voters of the political subdivision and without receiving the approval of 60 per cent of the persons voting thereon.

QUESTIONS PRESENTED FOR REVIEW

1. Do the three-fifths vote requirement of the West Virginia Constitution and the statutes dealing with elections held by political subdivisions of the state for determination of whether bond indebtedness should be incurred, and the 60 per cent vote requirement provided by the West Virginia Constitution and statutes relating to elections to authorize local tax levying bodies to make additional levies for tax purposes in excess of levy rates provided for in the Tax Limitation Amendment to the West Virginia Constitution, conflict with and violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does "equal protection of the laws" mean "majority rule" in elections concerning bonded indebtedness or tax levies?

STATEMENT OF THE CASE

On April 29, 1968, the Respondent, The Board of Education of the County of Roane, a governmental corporation and a political subdivision of the State of West Virginia, submitted to the voters of Roane County a proposal calling for the issuance of general obligation bonds in the amount of $1,830,000 to be retired over a period of not more than twenty (20) years from the date of issuance thereof, with interest not exceeding 5½ per cent per annum for the purpose of constructing new school buildings and making other improvements to the educational facilities of Roane County. On the same date by separate ballot there was also submitted to the voters of Roane County a proposal to authorize the Board of Education to lay additional tax levies in excess of the constitutionally authorized rates for a period of five (5) years, the proceeds of which were to be used for current expenditures and capital improvements. A canvass of the results of the election disclosed that 2,887, or 51.55 per cent of the total votes cast on the question of the issuance of bonds, favored the issuance thereof, and that 2,866, or 51.51 per cent of the total votes cast on the question of authorizing the additional tax levies, favored the additional levies. The canvassing authority, under the constitutional and statutory provisions quoted hereinabove, concluded that each proposal did not obtain the necessary affirmative votes and declared that both issues had failed of passage. [Plaintiffs' Complaint, *Appendix*, page 4a.]

Thereupon, Respondents, Granville H. Lance, Fred

Hill, Chester C. Dodd, Jr., Brady D. Hickel, Jr., and Joe Craddock, plaintiffs below, appeared before the Board of Education as citizens, voters and taxpayers of Roane County and spoke in their own behalf and, purporting to speak on behalf of all other persons who voted in the affirmative on each of the issues submitted, demanded that the Board authorize the issuance and sale of the bonds and that the Board lay the additional tax levies notwithstanding the constitutional and statutory provisions to the contrary. They then asserted that the statutory and constitutional provisions above quoted violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and also violated the provisions of Article IV, Section 4 of the Constitution of the United States which guarantees to every state a republican form of government. The Board, of course, refused to grant the demands of the plaintiffs below. [Plaintiffs' Complaint, *Appendix*, page 4a.]

Shortly thereafter the said Respondents, plaintiffs below, instituted two separate declaratory judgment actions in the Circuit Court of Roane County, the first seeking a declaration that the constitutional and statutory provisions above quoted pertaining to the issuance of general obligation bonds, and the second seeking a declaration that the constitutional and statutory provisions concerning the laying of excess levies, each be declared unconstitutional and void as violative of the Fourteenth Amendment and of Article IV, Section 4 of the Constitution of the United States. The actions were consolidated and after the Circuit Court of Roane County ruled contrary to their position and sustained the defendants' (Respondents herein) Motion for Judgment on the Pleadings [*Appendix*, page 18a], plaintiffs

below appealed the consolidated action to the Supreme Court of Appeals of the State of West Virginia. The result of this appeal was the opinion of the said Court set forth in *Appendix*, page 22a, which sustained plaintiffs' position and adjudicated that the above quoted provisions of the Constitution and statutes of the State of West Virginia violated the Fourteenth Amendment to the Constitution of the United States and were therefore unenforceable and void.

When this decision was announced, your Petitioners, as citizens, voters and taxpayers of Roane County, moved to intervene as additional parties defendant to prosecute a motion for rehearing and if necessary a further proceeding by writ of certiorari to this Court. Your Petitioners were permitted to intervene as additional parties defendant and after status as defendants was obtained, Petitioners' Motion for Rehearing on the merits was denied by order set forth in *Appendix*, page 2a.

There were no factual issues raised in the pleadings by the original parties defendant. The case was presented for decision both to the Circuit Court of Roane County and to the Supreme Court of Appeals of the State of West Virginia on the pure question of law involving the constitutionality and validity under the United States Constitution of the extraordinary majority requirements of the Constitution and statutes of the State of West Virginia which are conditions precedent to the issuance of general obligation bonds and to the laying of tax levies in excess of the limitations prescribed by the Constitution and enabling statutes of the state. The Supreme Court of Appeals of the State of West Virginia held, in short, that the extraordinary-

majority requirements above mentioned violated the equal protection clause of the Fourteenth Amendment as expounded by this Court in the famous "one person, one vote" decisions. It held, over the vigorous dissent of Judge Haymond, that the "one person, one vote" cases and the equal protection clause require that every election be decided by a simple majority; otherwise, every person who votes in the affirmative on a proposal which requires a super-majority for passage is discriminated against by the "unlawful weighting" or "dilution" of his vote [see *Appendix*, page 22a].

ARGUMENT

This case has been placed on the Summary Docket for disposition, and, accordingly, this argument will be unprotracted. The question presented here is utterly novel. So far as we can ascertain there is no clear precedent upon which to base a decision on either side of the question, save this case itself as resolved by the lower court and other more recent decisions which we will discuss presently.

The reason for the total lack of precedent on this question is that the soundness of the extraordinary-majority requirements invalidated by the lower court has never before been questioned. The suggestion that "equal protection of the laws" means "majority rule" has never before been seriously made to, or seriously considered by, a court of last resort in any jurisdiction. Majoritarian principles do not and have not generally prevailed in our system of self-government. In fact, the very stability of our Republic, and the philosophical foundation of the Great American Experiment, is derived from a unique combination of nonmajoritarian principles—the doctrine of separation of powers, the

executive veto, plurality elections, bicameral legislatures, and judicial supremacy are classic examples. These principles, to a greater or lesser degree, are expressed not only in the Federal Constitution, but in the basic law of all of the fifty states. They are firmly rooted historically. James Madison, in *The Federalist (The Federalist* No. 43, at page 278 [New American Library Ed. 1961]), explained that the reason an amendment to the Constitution requires an extraordinary majority is that "[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults".

Historically, politically, and judicially, the power of minority veto, the antithesis of "majority rule," is beyond responsible criticism. It has served this nation well and vested it with a stability not disturbed by transient majorities. We urge that it remain so. Reduced to its true intent, the argument asserted by the Respondents is that the political theory of the basic law of the State of West Virginia should be altered by judicial decree to one of strict majoritarianism. Their contention, erroneously adopted by the Court below, has nothing to do with injustice, or discrimination, or political inequality, or with any other constitutionally proscribed practice. They urge a drastic change of our theory of government. The Fourteenth Amendment contains no such commandment.

One Man, One Vote

In a proper but fruitless search for controlling precedent, the Court below relied for its decision upon the various rulings of this Court referred to collectively as the "one man, one vote" cases. These several cases

involved factual situations not remotely similar to ours. Here, there has been no "fencing out" of any voter from the election process. Here, there has been no "weighting" or "dilution" of the vote of any voter when compared with the vote of every other voter. As Judge Haymond observed in his dissent, "Each voter in that election cast one vote and each vote so cast was counted as one vote for one voter". [*Appendix*, page 59a]. To attempt to employ the principle enunciated in the "one man, one vote" cases to invalidate an extraordinary-majority requirement in an election to decide the issuance of general obligation bonds is comparable to an attempt to use the rules of arithmetic to teach spelling. It is a problem of semantics. See "What Has the Supreme Court Taught?", 72 *W. Va. Law Review* 1. The Respondents herein, and the Court below, became so hypnotized with the phrase "one man, one vote" that they ignored both the realities of its applicability and the constitutional foundation upon which it rests. "Equal protection of the laws" and "majority rule" are wholly distinct concepts. The former is a constitutionally guaranteed right of citizenship, while the latter is a political theory, a vastly different thing.

This Court has repeatedly stated, most recently by Mr. Justice Black in *Hadley* v. *Junior College District*, ... U.S. ....., 25 *L. Ed. 2d* 45, at page 50 (decided Feb. 25, 1970), that in determining the applicability of the "one man, one vote" rule, "the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process". This test was met in the Roane County election. The right of equal participation in the election process is now established as a fundamental right, but it does not carry with it a constitutional right to win an election, even though one

receives the most votes. The case of *Fortson* v. *Morris*, 385 *U. S.* 231, 17 *L. Ed. 2d* 330, 87 *S. Ct.* 446, totally ignored by the court below, so held. If a candidate for Governor who receives more votes than any other candidate has no constitutional right to win the election, how can the proponents of a bond issue claim a greater right? In the *Fortson* case, this Court refused to distort the "one man, one vote" rule, notwithstanding the eloquent dissent of Mr. Justice Fortas, and held that the Constitution does not purport to fix methods by which the several states must elect public officials so long as every qualified voter is treated with equality. So here, it must be admitted, the Constitution does not purport to fix methods which the people of a state must follow to regulate the fiscal affairs of its political subdivisions so long as every voter is treated equally with every other voter.

In all of the "one man, one vote" cases a particular class of voters was either disenfranchised or discriminated against because of place of residence or other status-producing factor, and in all such cases the class subject to the discrimininationwas demonstrable prior to the election. No such situation exists here and no such class of individuals exists here. The Court below erroneously concluded that the 60 per cent requirement had the effect of creating a class of "affirmative voters" subject to discrimination. This conclusion is patently unsound since a person who votes in the affirmative on one bond issue may vote in the negative on the next. Thus, the so-called "class" would change according to the merits of the proposal and the inclination of the voter. There could be no prospective "discrimination". The inclusion of the individual within this "affirmative voter" classification would depend solely on the way

he decides to vote on the matter in issue and the election is concluded before the "class" is defined. (See "Extraordinary Majority Voting Requirements," 58 *Georgetown Law Journal*, page 411.)

The fact is, and we urge the Court to so hold, that extraordinary-majority requirements such as those in the instant case do not result in class legislation or discrimination in any form, but rather are based on neutral principles. They make no distinction between individuals or classes of individuals. They are rooted in the political ideal of relative stability in a given area of governmental action and all citizens stand equally before them. In truth, the people have reserved to themselves certain legislative powers and have refused to delegate or entrust those powers to the officers of certain political subdivisions. No constitutional provision prohibits such a reservation of powers. In the case of *Hunter* v. *Erickson*, 393 *U. S.* 385, 21 *L. Ed. 2d* 616, 89 *S. Ct.* 557, Mr. Justice Harlan, in a concurring opinion, stated:

> "This same analysis applies to other institutions of government which are even more solidly rooted in our history than is the referendum. The existence of a bicameral legislature or an executive veto may on occasion make it more difficult for minorities to achieve favorable legislation; nevertheless, they may not be attacked on equal protection grounds since they are founded on neutral principles. Similarly, the rule which makes it relatively difficult to amend a state constitution is commonly justified on the theory that constitutional provisions should be more thoroughly scrutinized and more soberly considered than are simple statutory enactments". [393 *U. S.*, at 394-395.]

In our case, the people of West Virginia decided by majority vote, by provision in the basic law of the state,

that none of its political subdivisions should incur general obligation, long-term indebtedness, or levy taxes beyond specified rates, without approval of 60 per cent of the voters at an election specially called. Again, in 1966, the people of the state decided by majority vote to retain this three-fifths requirement in their Constitution [*Appendix*, page 67a]. They recognized the desirability of preventing burdensome indebtedness and excessive taxation without approval of an extraordinary majority. Unlike ordinary legislation, a bond issue, once done, cannot be undone. It obligates future voters, future property owners and taxpayers, and possibly even persons unborn at the time of the election. Stability and restraint throughout the State were thought desirable because reputation for fiscal integrity cannot be localized. If one political subdivision of this state were to default on a general obligation bond it would seriously and adversely affect the credit rating and salability of bonds of every other political subdivision and even of the state itself. To assert that such a reservation of legislative power, and such a restriction on fiscal irresponsibility, constitutes class legislation and discriminates against a particular class of individuals is to engage in heights of illogic.

Two other recent cases deal specifically with this question. A Three-Judge District Court in Minnesota in the case of *Rimarcik* v. *Johansen*, ... *F. Supp.* ....., 38 *U.S.L.W.*, page 2453 (Feb. 4, 1970), invalidated on equal protection grounds a Minnesota statute requiring a 55 per cent affirmative vote to pass a home-rule charter amendment to permit sale of liquor on a local-option basis. That Court held that such a requirement was discriminatory and it could perceive no compelling state interest to justify it. On the other hand, the Supreme

Court of the State of Idaho, in the case of *Bogert* v. *Kinzer*, 465 *P. 2d* 639 (Idaho, Feb. 17, 1970), upheld the validity of constitutional provisions of that state which require an affirmative vote of two-thirds of the persons voting to authorize the issuance of general obligation bonds. In a scholarly opinion by Judge Shepard, that Court specifically rejected both the language and the reasoning of the Supreme Court of Appeals of West Virginia in the case at bar. It held that a concensus amounting to more than a simple majority is not only desirable but necessary at certain times and in certain circumstances. It also held that the judicial branch of government should not make a determination between competing political theories when the people and the legislature have spoken. Our case demands an identical result.

Apparently, the Respondents have recently recognized the tenuity of their case. On pages 5 and 6 of Respondents' Brief in Opposition to the Petition for Writ of Certiorari we find the following statement: "The Fourteenth Amendment neither compels nor forbids a majoritarian principle . . ." If this is true, and it is, what is this case all about? Would they have every election decided by the toss of a coin? The Constitution does not compel a majoritarian principle, and it does not forbid an extraordinary-majority requirement.

CONCLUSION

For the reasons stated, we respectfully submit that the extraordinary-majority requirements of the Constitution of the State of West Virginia, and of the enabling statutes enacted pursuant thereto, are valid and enforceable, and that the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

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